No. 89-378 (5)

IN THE

Supreme Court Of The United States

October Term, 1989

STATE OF ALABAMA, ex rel. DON SIEGELMAN, ATTORNEY GENERAL, AND DON SIEGELMAN, INDIVIDUALLY AS A CITIZEN OF THE STATE OF ALABAMA,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND LEE M. THOMAS, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND CHEMICAL WASTE MANAGEMENT, INC., AND THE STATE OF TEXAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT CHEMICAL WASTE MANAGEMENT, INC.'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The respondent Chemical Waste Management, Inc. ("CWM"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 871 F.2d 1548.

a. **Respondent's Statement Of The Facts.**

Geneva Industries is an abandoned refinery in a highly urbanized area near Houston, Texas. (Defendants' Exhibit 3, at 1.) Thirty-five thousand people live within one mile of the site, and the closest residences are only fifty feet from the boundary. (Def. Exh. 3.) EPA identified the site for attention on the National Priorities List almost five years ago, ranking it as a site warranting immediate remedial action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.* *See* 49 Fed. Reg. 37,083 (Sept. 21, 1984). Nearly three years ago, after following all applicable policies and procedures,[1] including consultation with the State of Texas and notification to and opportunity to comment for the people residing near the contaminated area, EPA decided that the site should be cleaned up by excavating and removing PCB-containing soil to a secure, off-site disposal facility. (*See* Def. Exh. 3.) No specific disposal facility was selected by EPA. Rather, EPA merely decided the site should be cleaned up by excavation and disposal at a permitted, secure off-site landfill; it did not decide which landfill. (Petition, Appendix, p. 51a).

The Texas Water Commission ("TWC"), not EPA, was the lead agency on the cleanup. TWC had the responsibility to define the technical scope and specifications of the cleanup. Therefore, after EPA made the general decision to clean up

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[1]Under CERCLA, EPA first consults with the State within which the site is located to determine whether EPA or the State will be the lead agency for the cleanup. In the instant case, Texas, through the Texas Water Commission ("TWC") became the lead agency. The first step is then the "Remedial Investigation" ("RI") of the site, usually accomplished under contract with the lead agency. After the RI, a "Feasibility Study" ("FS") is conducted for the site in order to determine what actions would be appropriate to remedy or minimize the hazard at the site. This "RI/FS" process sets forth the various options available, addresses their cost-effectiveness, and identifies ones which provide protection for human health and the environment. EPA then undertakes to evaluate the options, and releases the FS for public review. After public comment, EPA issues a Record of Decision ("ROD") for the site in question indicating EPA's determination of which option for remediation is selected. The ROD in the instant case was issued September 18, 1986, indicating EPA's selection of off-site disposal at a permitted landfill as the favored alternative. (Def. Exh. 3.)

the site by excavation and removal, TWC prepared project specifications and followed the time-consuming government contracting process[2] that had to precede implementation of EPA's remedial decision and actual cleanup of the health threat faced by Houston's residents. CWM was the successful bidder to conduct the cleanup, proposing to use its permitted Emelle, Alabama facility as the site for ultimate disposal.

1. *The Geneva Industries Record of Decision and Its Implementation.*

The remedy selected for the Geneva site includes excavation of PCB-containing drums and soils and their transport to a secure, permitted off-site landfill. This remedy was selected only after EPA and TWC completed a thorough review of alternative disposal options. (*See* Record of Decision, Def. Exh. 3.)

CERCLA's purpose is to remediate health threats posed by the release or potential release of hazardous substances to the environment. EPA's policy under CERCLA is to select remedial action that meets applicable or relevant and appropriate federal environmental and public health requirements. In selecting the Geneva remedy, EPA considered whether the identified alternatives were consistent with applicable statutes and EPA's CERCLA regulations, which are set forth in the National Contingency Plan ("NCP"). (*See* 40 C.F.R. Part 300.)

The CERCLA process also requires public participation in the decision making on a remedial action. The obvious focus of this participation requirement is the local population,

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[2]TWC followed federal procurement guidelines in soliciting and reviewing bids for the Geneva site contract. An advertisement for bids was published in the local *Texas Register* on January 8, 1988; a national advertisement was circulated for three weeks in the *Commerce Business Daily* of the U.S. Department of Commerce beginning January 4, 1988. Affidavit of Robert I. Chapin. (Doc. Rec. No. 17.) TWC selected the lowest responsive bid, which was submitted by CWM. In addition to being the on-site contractor, CWM proposed to use its own permitted disposal facility at Emelle, Alabama as the primary disposal site. TWC and CWM entered a contract for the remedial action on April 18, 1988. EPA is not a party to that agreement. Affidavit of John Meachum. (Doc. Rec. No. 17.)

which is threatened by the release of hazardous substances; has a direct interest in assuring that the remedy selected will adequately address that threat; and, unlike the population surrounding a permitted disposal facility, has no other forum in which to air their concerns. EPA considered all public comments as required by CERCLA and its regulations.[3] In fact, EPA went so far as to reevaluate its decision based upon after-the-fact comments by Alabama legislators. While not required, EPA went out of its way to allow for public participation, and participation by the plaintiffs below.

EPA and TWC considered three disposal options for the Geneva soil: off-site land disposal, on-site incineration and off-site incineration. The agencies determined that all three options were equally protective of human health and the environment and, thus, chose the most cost-effective remedy — off-site land disposal.

Off-site incineration was rejected because it offered no greater protection; cost more than twice as much as off-site land disposal; and may have been impracticable due to the scarcity of facilities. Only three incinerators approved for burning PCBs then existed and all were operating very close to full capacity. (*See* Def. Exh. 3, at 23.)

Similarly, on-site incineration was ruled out because it provided no greater environmental protection and cost about 40 percent more than land disposal. This option also provoked substantial public anxiety because the Geneva site is located in an urban area. Approximately 35,000 persons live within one mile of the site, with the nearest homes less than 50 feet from the site's boundaries. (Def. Exh. 3, at 22-23.)

Once EPA signed the Record of Decision, which did not specify any particular off-site disposal facility, implementation of the remedy was TWC's responsibility. The Texas

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[3]These regulations, which do not provide for notice and comment by States that may ultimately receive CERCLA cleanup wastes, have themselves been the subject of notice and public comment. *See, e.g.*, 47 Fed. Reg. 10972 (March 12, 1982); 47 Fed. Reg. 31180 (July 16, 1982).

agency prepared detailed specifications for excavation and disposal of the Geneva soils and solicited contract proposals. Along with other bidders, CWM submitted a proposal for disposal at the Emelle facility. Following a protracted government contracting process, TWC awarded the contract to CWM. The contract itself specifies that while EPA grant monies are partially funding the project, neither the United States nor EPA is a party to the contract. Meachum Aff., Exh. B (Doc. Rec. No. 15).

2. *The Emelle Facility.*

The CWM Emelle facility receives hazardous and PCB wastes, some of these being every day. These wastes are placed in disposal cells that EPA and the State have determined are properly engineered. In addition, as the EPA Administrator stated in his letter to Alabama Senator Richard Shelby, the facility enjoys a unique hydrogeologic setting that provides unparalleled natural containment for a landfill. (Doc. Rec. No. 17.)

As the nation's largest landfill, the Emelle facility is well able to dispose of the Geneva soil. The Geneva cleanup will use less than 1.2 percent of the facility's existing federally approved PCB disposal capacity. *See* Affidavit of Dr. Rodger Henson ¶ 5 ("Henson Aff.") (Doc. Rec. No. 15).

The Emelle facility is subject to comprehensive regulation by EPA and the Alabama Department of Environmental Management ("ADEM"). The facility is one of only nine landfills in the country that are authorized to treat, store and dispose of PCBs, and one of only a handful with sufficient capacity for the Geneva soil. CWM's handling of PCBs is governed by approval letters and regulations (*see* 40 C.F.R. Part 761) issued by EPA under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 *et seq.*, dating back to 1978.

The facility's PCB approvals rest on EPA's finding that, due to the site's hydrogeologic setting, landfill design and operating procedures, the disposal of PCB wastes such as those at the Geneva site does not present an unreasonable risk of injury to human health or the environment. For this

reason, EPA has approved the Emelle facility to dispose of PCBs in concentrations at levels greater than those found in the Geneva soils. *See* Henson Aff., Exhs. 1 & 3 (Doc. Rec. No. 15). In addition, in December 1984, EPA, CWM and the State of Alabama entered a Consent Agreement, which authorizes the Emelle facility to store and dispose of PCBs. (*See* Def. Exh. 2.)

EPA also regulates CWM's handling of other hazardous waste through a final permit issued under section 3005 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, on May 27, 1987 and effective on July 11, 1988. Prior to issuance of the final permit, CWM operated the facility under "interim status" in accordance with RCRA. CWM's hazardous waste operations are also regulated by ADEM through the Alabama Hazardous Waste Management Act. *See Ala. Code* §§ 22-30-1 *et seq.* (1975). ADEM proposed a draft hazardous waste permit for the facility in September, 1986 but has not yet issued a final permit. Until that permit is issued, CWM is authorized to operate under state "interim status" in accordance with ADEM's regulations at Rule 335-14-8-.07, ADEM Administrative Code.

Under both RCRA and TSCA, as well as state law, CWM is authorized to handle a broad range of hazardous wastes and PCBs. That authorization is general, not specific. CWM is authorized, for example, to dispose of *any* soil containing PCBs, such as the Geneva soil, regardless of its source and without any requirement for specific regulatory authorization for particular shipments.

3. *Public Participation in EPA Decisionmaking Regarding Waste Handling at the Emelle Facility.*

Petitioner and the citizens of Alabama have had numerous opportunities for input into EPA's decisionmaking regarding the receipt of waste, such as the Geneva soil, at the Emelle facility. In fact, they have been given the opportunity to comment on whether the Emelle facility should be allowed to landfill PCBs exactly like those to be shipped from the

Geneva site. In May 1978, when EPA considered the initial application from the facility for approval under TSCA to landfill PCBs, EPA provided notice of the application and solicited public comment through local newspapers. *See* Henson Aff., Exh. 1 (Doc. Rec. No. 15). No comments were received from the public; indeed the State of Alabama *recommended* that EPA approve the site for PCB disposal. *Id.*

More recently, in 1985, ADEM received notice of both CWM's application and EPA's TSCA approval for use of the Emelle facility's Trench 21 for PCBs. *Id.*, Exhs. 2 & 3. EPA's action, and its underlying finding that PCB disposal at Emelle poses no threat to human health and the environment, were reviewable in federal court under the Administrative Procedure Act. Nevertheless, neither ADEM nor any of the plaintiffs below took any action to oppose EPA's grant of TSCA approval to dispose of PCBs in Trench 21, including PCB soil such as that from the Geneva site.

In addition, since September 1986 when EPA proposed a draft RCRA permit for the Emelle facility, issues regarding disposal of hazardous waste have been fully and publicly aired in the permitting proceeding. In that proceeding EPA, jointly with ADEM, provided extensive opportunities for the citizens of Alabama to review and comment on CWM's permit application and draft federal and state permits. The agencies provided twice the time for public comment prescribed in EPA's RCRA regulations. (*See* 40 C.F.R. §§ 124.10-124.14.) They held a public information meeting and a 7½-hour public hearing in Livingston, Alabama near the Emelle facility. In all, EPA received 78 oral statements and 145 written comments on the draft RCRA permit. Indeed, the first oral statement at that hearing was that of the petitioner, Alabama Attorney General Siegelman. The Emelle facility's extensive role in the national effort under CERCLA to clean up abandoned hazardous waste sites was freely discussed in this process.

Upon issuance of that permit in May 1987, the State and some Alabama citizens petitioned the EPA Administrator for review of the permit decision. In May 1988, the Administrator granted partial review and, at his direction, EPA

Region IV subsequently modified several permit conditions. As to the remaining issues, the State and citizens groups have filed petitions for review, which are now pending before the Eleventh Circuit. (Dkt. Nos. 88-7523 & 88-7528.)

b. **The Proceedings Below.**

On September 28, 1988, petitioner the State of Alabama *ex rel.* Don Siegelman, Attorney General, along with individuals Guy Hunt (the Governor of Alabama), Don Siegelman (the Attorney General), and Leigh Pegues (the Director of the Alabama Department of Environmental Management) filed an action in the United States District Court for the Middle District of Alabama against the U.S. Environmental Protection Agency and its then Administrator, Lee Thomas, seeking an injunction to halt the ongoing cleanup of the Geneva site, and thereby to stop the interstate shipment of some 47,000 tons of soil contaminated with PCBs from the Geneva site to the disposal facility at Emelle, Alabama operated by CWM which has been permitted by EPA, upon the State of Alabama's recommendation, as safe for disposal of PCBs.

On October 3, 1988, the plaintiffs below filed a motion for a temporary restraining order to halt the cleanup in Texas and to stop the interstate transportation of the PCB-contaminated soil to Alabama. On October 4, 1988, CWM filed a motion for leave to intervene as a defendant; on October 12, 1988, the State of Texas also filed a motion to intervene as a defendant. These motions were granted by the district court on October 20, 1988.

On October 21, 1988, the district court issued a temporary restraining order, accompanied by a written memorandum opinion. (Petition, Appendix, p. 1a.) On October 31, 1988, the district court, after requiring the plaintiffs to post a bond in the amount of $564,970.00, entered a preliminary injunction based, in part, on the judge's own belief that the definition of hazardous waste was sufficient to demonstrate environmental harm, even though the plaintiffs did not allege any. The judge thereby prohibited the continuation of

any cleanup activity at the Geneva site or the expenditure of any federal funds in furtherance of the cleanup.

On November 1, 1988, the State of Texas and CWM filed a joint notice of appeal, and, on November 2, filed with the Court of Appeals for the Eleventh Circuit a joint motion to expedite the appeal. Defendants EPA and Lee Thomas filed a separate notice of appeal on November 3, 1988, and also filed a motion to expedite the appeal. The motions to expedite were granted. On November 4, 1988, the plaintiffs filed a cross appeal on the issue of the requirement of a bond.

Prior to the Eleventh Circuit's consideration of the appeal, the district court granted partial summary judgment to the plaintiffs, ordered EPA to reopen its Record of Decision for the Geneva site, and dismissed the remainder of the case.

On April 18, 1989, the Eleventh Circuit reversed the district court's grant of preliminary injunction and partial summary judgment, dissolved the permanent injunction, and dismissed the case for lack of subject matter jurisdiction. The court also dismissed as moot the plaintiffs' challenge to the requirement of a bond which had been imposed by the district judge. (Petition, Appendix, p. 91a.)

On June 7, 1989, the Eleventh Circuit denied the appellees/cross-appellants' (petitioners herein) petition for rehearing. This petition followed.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied by this Court because the Court of Appeals for the Eleventh Circuit correctly ruled that the petitioner lacked standing to raise the constitutional claims. In addition, the Court of Appeals was correct in finding that the district court lacked jurisdiction over the petitioner's statutory claim. Finally, no other overriding reason exists for this Court to grant the writ.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY HELD THAT PETITIONER DOES NOT HAVE STANDING UNDER THE FIFTH AMENDMENT TO CHALLENGE A CERCLA REMEDIAL ACTION PLAN.

A. *The Petitioner Lacks Standing Because He Has No Injury-in-Fact.*

The Court of Appeals for the Eleventh Circuit held that petitioner lacks standing to pursue his constitutional claims. (871 F.2d at 1554-56; Petition, Appendix, pp. 58a-68a.) Petitioner challenges the court's finding, claiming the Eleventh Circuit "misapprehended the nature of the constitutional claims advanced on behalf of the individual plaintiffs." (Petition, p. 17.) Petitioner insists, "This is not a taxpayers' suit," (Petition, p. 18) but rather a case attacking "governmental action which deprives [petitioner] of his property and liberty without due process of law." (Petition, p. 18.)[4]

The law requires that in order to have standing to assert his constitutional claims a plaintiff must present at a minimum a "case or controversy" as mandated under Article III. This Court has held that requirement to mean that the plaintiff himself must suffer actual or threatened injury which directly results from the challenged activities and which is capable of redress by judicial action. *Warth v. Seldin,* 422 U.S. 490, 499 (1975). In addition, the plaintiff's injury must be personal, and not some generalized grievance concerning actions or conduct taken by government. *United States v. Richardson,* 418 U.S. 166, 174-75 (1974). Generalized grievances concerning government's conduct are left for consideration by the representative branches of government. *Allen v. Wright,* 468 U.S. 737, 751 (1984); *Valley Forge*

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[4]It is axiomatic that States are not "persons" within the meaning of the Due Process Clause. *South Carolina v. Katzenbach,* 383 U.S. 301, 324 (1966). Petitioner therefore does not assert the constitutional claims, as he did below, on behalf of the State.

Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982).

In the present case, the individual petitioner asserts that he, along with the other individual plaintiffs below who chose not to pursue this action further, possess a property interest in the use and enjoyment of the State's resources and that the defendants have deprived them of that use and enjoyment without due process of law. (Petition, pp. 18-19.) The petitioner asserts two specific injuries. First, petitioner claims that additional State expenditures and resources will be required to ensure safety along the State's highways due to trucks carrying waste from the Geneva site to the Emelle facility. (Petition, pp. 19-20.) Even assuming the alleged injury is real, the petitioner's claims arise from his status as a taxpayer, and not from a personal injury or threat of injury he suffered.

Clearly, the petitioner's taxpayer status is an insufficient basis to infer injury-in-fact as contemplated by Article III. Therefore, federal jurisdiction does not attach to the petitioner's claims and petitioner is without standing. *See Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218-19 (1974). The Court of Appeals ruling on this point is correct. (871 F.2d at 1554-56; Petition, Appendix, pp. 58a-68a.)

The other supposed injury petitioner contends allows him standing sufficient to confer federal jurisdiction is that the challenged action "would not only deprive the petitioner of landfill capacity within his own state, but will also divert the time and energy of the Alabama Department of Environmental Management." (Petition, p. 20.) Related to this specific statement of injury, which again for the individual petitioner is based on his taxpayer status and generalized grievance, is the implication by petitioner that he will be injured by the overall effect waste from the Geneva site will have on the environmental quality within the State of Alabama. (Petition, p. 20.) In this way, petitioner seeks to take

advantage of cases construing various citizen-suit provisions in environmental statutes to find a basis for standing in this case. (*See* Petition, p. 21.) However, once again the petitioner's claimed injury-in-fact is not the type contemplated or required for conferring federal jurisdiction over the petitioner's claims. As discussed in Section B below, even assuming petitioner's generalized grievance concerning overall environmental quality amounts to a cognizable injury-in-fact, the constitutional violations petitioner alleges are not the cause of any environmental injury. Therefore, the Court of Appeals correctly ruled the petitioner lacked standing to assert his claims.

B. *Petitioner's Alleged Injuries-In-Fact Were Not Caused by the Alleged Constitutional Violations.*

The petitioner now asserts injury based on the adverse impact shipment of the Geneva waste allegedly will have on the State of Alabama's overall environmental quality and landfill capacity. (Petition, p. 20.) Although the initial pleadings are devoid of any such allegation, the Eleventh Circuit addressed the issue and dismissed the petitioner's claim because the court found no causal connection whatsoever between injury to the State's environment and the lack of notice and opportunity to participate in the selection of the remedial action plan for the Geneva site. (871 F.2d 1554-56; Petition, Appendix, pp. 67a-68a.)

The CWM Emelle facility receives waste daily similar to the waste from the Geneva site, and is fully authorized by law to do so. Petitioner's complaint does not challenge the facility's federal and state permit status, nor its disposal operations. Instead, the petitioner claims that he personally, along with other citizens of the State, was entitled to notice and an opportunity to be heard with regard to EPA's ROD for the Geneva site. Indeed, under the petitioner's theory, the citizenry of every state in which a treatment, storage and disposal facility is located is entitled to notice and hearing for every EPA Superfund remedial action plan.

However, as the Court of Appeals correctly held, the petitioner's supposed injury does not result from the constitutional violations alleged. The petitioner does not directly challenge the shipment of waste from the Geneva site to CWM's Emelle facility. Instead, petitioner alleges constitutional defects in the notice and hearing scheduled by EPA for the Geneva ROD. The petitioner's alleged injuries simply do not result from the challenged conduct. The petitioner has failed to show the required causal connection between the violations alleged and the injury claimed, and that the injury is likely to be redressed by the requested relief. *Allen v. Wright,* 468 U.S. at 751. Therefore, the petitioner lacks standing to raise the constitutional claims.

II. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE PETITIONER'S STATUTORY CLAIMS.

The Court of Appeals held that Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), does not confer federal court jurisdiction to review challenges to a remedial action until after the action has been taken. (871 F.2d at 1557-59; Petition, Appendix, pp. 72a-87a.) The petitioner challenges the court's reading of the statute by claiming that its action is not a "challenge to the remedial action selected by EPA," but rather an "effort to restore to the petitioners their statutory and constitutional rights to a notice and an opportunity to be heard." (Petition, pp. 29-30.) The petitioner's argument belies the plain language of the statute itself and its legislative history.[5]

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[5]Section 113(h), 42 U.S.C. § 9613(h), states as follows:

(h) Timing of Review.

No Federal court shall have jurisdiction under Federal law other than under Section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under Section 9621 of this title (relating to clean-up standards) to review any challenges to removal or remedial action [sic] selected

Section 113(h), 42 U.S.C. § 9613(h), clearly precludes federal courts from reviewing any challenge to a CERCLA removal or remedial action, unless the challenge falls into one of five enumerated exceptions. In the present case, the petitioner contends his suit falls within the exception contained in Section 113(h)(4), 42 U.S.C. § 9613(h)(4). (Petition, pp. 28-29.)

Judicial review is available under Section 113(h)(4) for citizen suits challenging "removal or remedial action *taken* under Section 104 or *secured* under Section 106." (Emphasis added.) Congress' use of the past tense in this section reflects an unquestionable intent to bar review of *ongoing* cleanup actions. As explained by the House Judiciary Committee, from which this provision originated: "This provision is not intended to allow review of the selection of a response action *prior to completion* of the action: the provision allows for review only of an 'action *taken*' . . . "[6] The Conference Report affirms that Section 113(h)(4) bars review of ongoing response actions:

> [A]n action under Section 310 would lie *following completion* of each distinct and separable phase of the cleanup. For example, a surface cleanup could be challenged as violating the standards or requirements of the Act once all of the activities set forth in the Record of Decision for the surface cleanup phase have been *completed*. . . . Similarly,

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under Section 9604 of this title, or to review any order issued under Section 9606(a) of this title, in any action except one of the following:

. . .

(4) An action under Section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under Section 9604 of this title or secured under Section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

[6]H. R. Rep. No. 253, 99th Cong., 2d Sess. 23, *reprinted in* 1986 U.S. Code Cong. & Ad. News 3038, 3046 (emphasis added). The Report explains that this amendment was adopted to preclude litigation that could delay prompt cleanup of CERCLA sites. *Id.* The instant litigation is precisely the kind of delay of a CERCLA cleanup that was to be precluded by this Amendment.

> . . . a challenge could lie to a *completed* excavation or incineration response in one area. . . .[7]

Petitioner is challenging an ongoing phase of the remedial plan for the Geneva site: the off-site disposal of contaminated soil. Since that phase has not yet been completed, the district court lacked jurisdiction to review claims brought by the plaintiffs below. That plaintiffs couch some of their claims in constitutional terms makes no difference. *See South Macomb Disposal Authority v. EPA*, 681 F. Supp. 1244, 1251 (E.D. Mich. 1988) (Section 113(h) precludes constitutional challenges to CERCLA before completion of cleanup).[8]

The Court of Appeals correctly held that Section 113(h) precludes any review to the selection of a removal or remedial action. Section 113(h) then excepts from this bar, in subsection (4), certain citizen suits "alleging that the removal or remedial action *taken*" violated any requirement of CERCLA. The final sentence, however, states that even a citizen suit making such allegations cannot be brought regarding a removal where a remedial action is going to be accomplished at the site. This provision does not in any way confer jurisdiction over petitioner's claims.

It is important to note that the terms "removal" and "remedial action" are defined terms in CERCLA. 42 U.S.C. § 9601(23) and (24). A "removal" is the immediate action

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[7]H. R. Rep. No. 962, 99th Cong., 2d Sess. 224 (Conference Report), *reprinted in* 1986 U.S. Code Cong. & Ad. News 3276, 3317 (emphasis added). Although the Conference Report is unambiguous, the floor debates contain some contradictory remarks. *See* 132 Cong. Rec. S14898 (daily ed. Oct. 3, 1986) (remarks of Sen. Stafford); 132 Cong. Rec. H9575 (daily ed. Oct. 8, 1986) (remarks of Rep. Florio). However, these remarks were strongly contested by Representative Glickman, who served on the House Judiciary Committee and was responsible for section 113 in the Conference. *See* 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986). He affirmed that section 113(h)(4) bars *any* suit challenging an ongoing cleanup. *Id.* In face of the unambiguous language of section 113(h)(4), the Conference Report, and the remarks of Rep. Glickman, this Court should give no weight to any contrary views of individual members of Congress.

[8]Respondent is aware of only one case decided under CERCLA since the 1986 Amendments in which a court has held section 113(h) inapplicable. *See Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043, 1054-55 (D. Kan. 1987). In that case, however, the plaintiffs were not challenging selection of a remedy for a particular site and the requested relief would not have delayed any cleanup.

taken when hazardous substances have been released in order to minimize or mitigate damage. It includes such actions as fencing the area, providing alternative water supplies, or, if necessary, evacuation. A "remedial action" means those later actions taken at a site to permanently remedy the situation. Examples of remedial action include onsite incineration or excavation and transportation to an offsite landfill, such as has been done in the instant case. Thus, the last sentence of Section 113(h)(4), 42 U.S.C. § 9613(h)(4), which states that a citizen suit "may not be brought with regard to a *removal* where a *remedial action* is to be undertaken at a site" means that even a completed emergency "removal" (such as an evacuation) cannot be challenged when there is to be a later remedial action (such as excavation of contaminated soil and shipment to an offsite disposal facility). When read properly, it is evident this sentence has no application to the present case, which is a challenge to a "remedial action" not yet completed.

Section 113(h)(4) in no way allows petitioners to escape the general jurisdiction bar of Section 113(h), 42 U.S.C. § 9613(h). Therefore, the Court of Appeals was correct in ruling that the district court lacked jurisdiction to hear the petitioner's statutory claims.

III. NO OTHER OVERRIDING OR COMPELLING REASON EXISTS FOR THE WRIT TO BE GRANTED.

A review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when special and important reasons exist. No such special or overriding reason is present in this case. The decision of the Court of Appeals is not in conflict with the decision of any other federal court of appeals; the case does not involve a federal question decided in an way that conflicts with any state court of last resort; and, the case presents no unsettled constitutional questions that would warrant granting the writ. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

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